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No. 98-128

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JAMES MCNAMARA, *et al.*,
Petitioners,
v.
CITY OF CHICAGO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's finding that the gross underrepresentation of African-Americans and Hispanics at the rank of fire captain in the Chicago Fire Department was attributable to prior discrimination was clearly erroneous in light of the statistical, historical, and anecdotal evidence presented at trial.

2. Whether an affirmative action plan permitting African-Americans and Hispanics to be promoted out of strict rank order to the position of fire captain was narrowly tailored to redress prior discrimination when the minorities promoted under the plan had promotional examination scores that were statistically indistinguishable from the nonminorities they passed over; the plan guaranteed all nonminorities who were passed over eventual promotion; and it ameliorated some of the underrepresentation of minorities at the rank of fire captain attributable to prior discrimination.

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

In their initial complaint, filed on February 22, 1993, six nonminoritity lieutenants in the Chicago Fire Department ("CFD")— petitioners McNamara, Sullivan, Miller, Lux, King, and Dineen—alleged that they had taken and passed the 1987 promotional examination for captain. R. 1 at 2. They further alleged that the City of Chicago had unlawfully passed them over for promotion in favor of minorities in violation of the Equal Protection Clause of the Fourteenth Amendment, and they sought relief under 42 U.S.C. §§ 1981 and 1983. R. 1 at 3. Making similar allegations, petitioners Graf and Scavone were added as plaintiffs on April 6, 1983, R. 8-9, and petitioner Sobczak was added as a plaintiff on April 23, 1993, R. 11.

On March 18, 1997, after a bench trial, the district court held that the CFD's use of a limited number of promotions of African-Americans and Hispanics out of strict rank order was narrowly tailored to address the con-

tinuing effects of the CFD's prior intentional exclusion of African-Americans and Hispanics, and for that reason entered judgment against petitioners. Pet. App. 14-29. On March 18, 1998, the Seventh Circuit affirmed the district court's judgment. Pet. App. 1-13.

The evidence admitted at trial showed the following [1]:

The 1987 Affirmative Action Plan

The career service ranks within the CFD consist of the positions of firefighter, engineer, lieutenant, captain, and battalion chief. R. 95, Schedule A at ¶ 10. Firefighters and engineers are eligible to take the promotional examination for lieutenant. *Ibid.* Lieutenants are eligible to take the examination for captain. *Id.* ¶ 22. Captains are eligible to take the examination for battalion chief. Tr. 659.

The 1986 captains' examination consisted of three parts: a written multiple choice test given 65% weight; an oral board interview given 25% weight; and credit for seniority given 10% weight. R. 95, Schedule A at ¶¶ 23, 43. The exam was designed by the City's Personnel Department in such a manner so that it could be content-validated—shown to reflect content related to the requirements of the position. *Id.* ¶¶ 24-30. Dr. Richard Barrett, an expert in industrial psychology, psychometrics, and test development, testified that strict rank order use of the 1986 captains' examination had no demonstrable relationship to qualification for promotion. Tr. 1079-94. Given the small differences in candidates' scores, and in light of measures of validity and reliability, the rankings of the plaintiffs and the minorities receiving the challenged affirmative action promotions under the 1987 affirmative action plan were essentially tied, and

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[1] Petitioners repeatedly rely on materials that the district court excluded from evidence, briefly asserting that they "should not have been excluded." Pet. 5 n.1. But petitioners did not contest the exclusion of these materials in the court of appeals, nor in any of the questions they present for this Court's consideration. See Pet. i. Thus we will ignore all materials that the district court excluded.

there was no psychometric basis to believe that their future performance would differ. Tr. 1089-94. See also Tr. 77-79, 138 (testimony of Deputy Commissioner of Personnel Robert Joyce).

Each petitioner took and passed the 1986 captains' examination and was placed on a 1987 eligibility list. R. 95, Schedule A at ¶ 4. McNamara was ranked 152; Sullivan 153; Miller 154; Lux 157; King 159; and Dineen 166. *Id.* ¶¶ 53-58. These six petitioners were not promoted. *Ibid.* Graf was ranked 136; Scavone 138; and Sobczak 139. *Id.* ¶¶ 59-61. These three petitioners were promoted on April 1, 1992 but claimed that they would have been promoted on May 1, 1991 in the absence of affirmative action. *Ibid.*

The challenged affirmative action plan for promotions from the 1987 list was set forth in a letter dated July 9, 1987, from Commissioner of Personnel Jesse Hoskins to Fire Commissioner Louis Galante. Def. Exh. 6. Commissioner Hoskins observed that the CFD intended to make a total of 150 promotions to captain off the 1987 list. *Id.* at 1. If all promotions were made in rank order, African-Americans would have received 14% of the promotions and Hispanics would have received 4.7%. *Ibid.* At that time, 26% of the firefighters and engineers and 13.6% of lieutenants were minorities, while only 3% of captains were minorities. *Ibid.* Commissioner Hoskins concluded that the CFD should make a greater number of minority promotions than would occur by using the list in strict rank order. He cited three reasons for this conclusion: the need to comply with the 1980 consent decree entered in *United States v. Albrecht*, which required the City to promote so that the minority composition of each rank was more representative of the rank from which promotions were made: meeting the affirmative action goals of the City's collective bargaining agreement ("CBA"), which required each rank to be as close as possible to 45% black and Hispanic; and remedying past discrimination, which was still reflected in the

manifest disparity between the racial composition of the pool of incumbent captains and the qualified labor pool. Def. Exh. 6 at 1-2. He also believed that as a community service organization, the CFD needed to integrate its upper ranks to gain the trust and cooperation of the community. *Id.* at 4.

Commissioner Hoskins concluded that no race-neutral approach would achieve these objectives. Def. Exh. 6 at 3. Because only lieutenants can be promoted to captain, the City could not recruit minorities from outside the CFD, and could not make meaningful progress towards eliminating the effects of prior discrimination if it used the list in rank order. *Id.* at 1, 3.

Commissioner Hoskins therefore recommended that the CFD adopt a goal of 20% African-American and 5% Hispanic promotions. Def. Exh. 6 at 1. The difference in test scores between those receiving affirmative action promotions and those who would be promoted in strict rank order was not statistically significant. *Id.* at 4. And only those who received a passing score of 70 or above would be promoted. *Ibid.* In addition, the goals were temporary and were to be reviewed every time the CFD made promotions. *Ibid.*; Tr. 121-22.

On June 8, 1988, the City entered a "wrap-around" agreement with the United States Department of Justice ("DOJ") that supplemented the affirmative action plan. Under this agreement, before retiring the 1987 list, the CFD would promote to captain those individuals who would have been promoted had the City gone in rank order, but who were passed over to meet the goals of the affirmative action plan. Def. Exh. 8 at 2. Furthermore, if, in this last round of promotions, the City made additional affirmative action promotions, a commensurate number of rank order promotions would be made. *Ibid.* Petitioners Graf, Scavone, and Sobczak were subsequently promoted pursuant to the wrap-around agreement on April 1, 1992. Tr. 85-89. At the same time, the City made three more affirmative action promotions;

and consequently promoted three additional nonminorities ranked between 147-150. Tr. 86-87.[2]

Statistical Evidence Of Discrimination

Dr. Gerry Suchanek testified as an expert in labor economics, econometrics, and statistics. Tr. 638. Using binomial sampling model and standard deviation analysis, Dr. Suchanek conducted a series of benchmark studies spanning from 1950 to 1993 both for the entry level and the promotional ranks of the CFD. Tr. 680-81, 685-90, 710-11, 719.[3]

Given the requirements for entry and paucity of jobs with comparable benefits for the skill levels required of firefighters, Dr. Suchanek assumed that minorities would apply to the CFD in numbers equal to their representation in the census-based benchmarks for the period prior to 1974 for which he lacked actual applicant data. Tr. 699-703. Analysis of applicant flow data from the entry level exams starting in 1974 confirmed that African-Americans applied to the CFD at least proportional to their representation in the census-based benchmark and that Hispanics, although underrepresented, applied in increasing numbers after 1985, when the CFD eliminated barriers to entry. Tr. 700-02; Def. Exh. 67.

An initial series of three benchmarks for the years 1973-93 was drawn from census data for the City of Chicago. Tr. 670-71, 683, 706-07; Def. Exhs. 58, 64. Dr. Suchanek restricted each of his benchmarks to City

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[2] Rank 148 had already received an affirmative action promotion. Jt. Exh. 8.

[3] The CFD did not have racial identity information for those no longer active after 1982. Tr. 647-49. Based upon the racial composition of the CFD in 1973, as derived from the data on those active in 1983, Dr. Suchanek used a random number generator to assign race to those employed in the CFD from 1973-82 according to the technique of inferred probabilities. Tr. 649-52. If anything, Dr. Suchanek's randomization technique overestimated the number of minorities in the promotional ranks between 1973-82, especially the ranks of captain and battalion chief. Tr. 653-54; Def. Exh. 61 at 6-8; Def. Exh. 62.

residents between certain ages because these were restrictions set forth in the firefighter examination announcements from the late 1950s to present. Tr. 684, 691-94, 706-08. Dr. Suchanek did not restrict his benchmark for citizenship, which was a requirement for entry prior to 1978, for three reasons. First, census data necessarily accounts for citizenship by excluding illegal immigrants; second, there were virtually no legal immigrants from African countries; third, legal immigration from majority white countries was the same as or even larger than from Hispanic countries. Tr. 695-97. Dr. Suchanek also did not correct his benchmark from criminal background or drug usage because those were not screening requirements for application to the CFD for any time period relevant to the 1986 captains' examination. Tr. 697-98. In addition, because the examination announcements specifically stated that there was only a minimum reading comprehension requirement, Dr. Suchanek did not tailor his census-based labor pool for any educational level. Tr. 694, 698, 811. And any restriction of the qualified and interested labor pool to those who graduated high school, but had not completed four years of college—a more stringent standard than required by the CFD—only altered the disparities Dr. Suchanek observed by three to five percentage points. Tr. 788; Def. Exh. 67.

Dr. Suchanek's first, broadest benchmark compared for the years 1973-93 actual CFD racial composition with the population of the City, age 20-39. Def. Exh. 58 at 25-26; Def. Exh. 64 at Exh. 5; Tr. 709-13. The standard deviation of the aggregate number of actual non-minority personnel to expected personnel ranges from 55 standard deviations in 1973 down to 34.5 standard deviations in 1993. *Id.*

The second series of benchmarks compared the actual composition of the CFD from 1973-93 to men who resided in Chicago during that period and were between age brackets set forth in various examination announcements. Def. Exh. 58 at 17; Def. Exh. 64 at Exh. 6; Tr. 719. This series of benchmarks revealed the same devia-

tions between actual and expected CFD racial composition contained in the first benchmark, thereby demonstrating that neither age nor sex were significant discriminators. Def. Exh. 58 at 17; Def. Exh. 64 at Exh. 6; Tr. 715, 719-20.

In this third series of benchmarks, Dr. Suchanek compared the racial composition between 1973-93 of each rank within the CFD with his census-based qualified and interested labor pools. Def. Exh. 58 at 17-18; Def. Exh. 64 at Exh. 7; Tr. 720-26. Regardless of the age group, for each rank and in each year, the disparities between the actual and expected nonminority composition of the CFD greatly exceeded three standard deviations. Def. Exh. 64 at Exh. 7; Tr. 720-26.

Dr. Suchanek utilized a fourth census-based benchmark to compare actual CFD composition with what he referred to as a hypothetical CFD population for the years 1950-93. Tr. 737-39. This benchmark accounted for changes in the population and the lag time between promotion to various ranks by using the year of hire of actual CFD members. Tr. 737-38, 746. Dr. Suchanek restricted his census-based qualified and interested labor pool to account for entry requirements. Def. Exh. 61 at 4, 13; Tr. 734-35. This benchmark as well showed large disparities that could not be explained by anything other than a pattern of discrimination in hiring and promotion. Def. Exhs. 61, 63, 68; Tr. 748. Disparities ranged between 12-17 standard deviations for lieutenant; 7-10 standard deviations for captain; and 4-8 standard deviations for battalion chief. Def. Exh. 68 at 2-4. This benchmark further shows that affirmative action and nondiscriminatory hiring have not significantly reduced the effects of race-based hiring and promotion practices. Def. Exh. 61 at 15; Def. Exhs. 63, 68; see also Tr. 748-54; Def. Exhs. 67, 68 (additional benchmark demonstrating that historical gross disparities remain unexplained when adjusted to reflect actual CFD hiring practices once discriminatory hiring practices were eliminated).

Dr. Suchanek additionally conducted a series of analyses using as benchmark populations the actual racial composition of the CFD promotional ranks between the years 1973-93. Def. Exh. 58 at 17-18; Def. Exh. 61 at 16-18; Def. Exh. 64. The promotional pool for each rank was those who held the rank or ranks eligible to compete for promotion. Tr. 757-58. These analyses necessarily mask the true disparities that exist in the promotional ranks because they do not take into account the impact of past hiring and promotional practices on a rank's racial composition. Tr. 749.

In order to isolate the impact of past promotional practices, Dr. Suchanek conducted three separate analyses for the years 1950-93 comparing how long it was taking African-Americans, Hispanics, and nonminorities on average to be promoted to each career service rank. Def. Exh. 61 at 9-12; Def. Exh. 63; Tr. 761-67. His computations showed that on average prior to 1985, for all ranks, African-Americans and Hispanics spent more time in service than nonminorities. Def. Exh. 61 at 10-11; Def. Exh. 63; Tr. 762. After 1985, Dr Suchanek observed a decrease in minority time in rank which he attributed to a change in hiring and promotion practices. Tr. 763-64.

Anecdotal And Historical Evidence Of Discrimination

A number of witnesses testified to a history of intentional discrimination against African-Americans and Hispanics in the CFD from at least the 1950s into the late 1970s that began at the application stage. Witnesses testified to the perceived pretextual disqualification of African-Americans for reasons such as flat feet. Tr. 206; 240-41; 939-40. As to Hispanics, the Fire Commissioner from 1957 to 1978, Robert Quinn, R. 95, Schedule A at ¶ 7, let it be known that they were officially unwelcome in the CFD. In the 1970s, he told James Winbush, Jr. ("Winbush"), an African-American firefighter, that Hispanics "weren't tall enough to fight fires and they have to go back to Mexico." Tr. 372. See also Tr. 493-96

(testimony of Francisco de la Cerna regarding exclusion of Hispanics).

Once minorities made it through the door, they were sent to training academy classes in the 1950s through 1973 that had at most a handful of African-Americans and usually no Hispanics. Tr. 207, 375-76, 559, 871-72, 899, 921, 952. African-Americans were then assigned to segregated houses located on the south and west sides. Tr. 456, 507, 872, 922-23, 941-42, 952, 963, 982, 995.

Throughout the 1950s and 1960s, the officers at the all-black companies were nearly always white. Tr. 271, 454, 504-05, 600-01, 872, 922-23, 952, 964, 982, 995. The white officers were assigned to African-American companies as a form of punishment for disciplinary infractions. Tr. 454, 968, and would not stay in the house, Tr. 452-53, 600. For the most part, the CFD did not promote African-Americans, but instead had some African-Americans who were permanent acting officers. Tr. 334-35. The few African-Americans who were officers were almost always assigned to the African-American companies. Tr. 216, 270, 941-42. Although these African-American houses were routinely the busiest in the City, *e.g.*, Tr. 382-83, 457-59, 508, 565-66, 601, they had older equipment than the white ones, Tr. 567-68, 604-05, 876. Some of the African-American houses also were in poor condition. Tr. 210, 254-55, 953-55.

Prior to 1965, Commissioner Quinn told firefighters that the timing was not right for desegregation, Tr. 569, and that if he desegregated, "half of the Caucasians on the job would quit," Tr. 947. Francisco de la Cerna ("de la Cerna"), who is African-American, testified that he was recalled from his initial assignment to an all-white fire house and told by a CFD chief that "I made a mistake on your assignment," Tr. 502, "I thought you were one of us but I see you aren't." Tr. 503.

Segregation was so rigidly enforced throughout the 1950s through the mid-1960s that the black fire houses had more firefighters than needed. Tr. 509-10, 566, 601-

02, 845. The men consequently had a process by which they would select who would go home for the night. Tr. 566-67, 601-02. Despite this overstaffing, prior to 1965, African-Americans were not detailed out to white houses. Tr. 456, 563, 600, 874.

As late as the 1970s, the CFD had a policy of denying African-Americans' requests to transfer to white houses. *E.g.*, Tr. 459, 875, 923-24, 964-65, 988-89. Indeed, requests for transfers to white companies by black firefighters apparently set off alarm among the CFD hierarchy. *E.g.*, Tr. 602-03 (testimony of Elwain Parks, who is African-American, regarding CFD chief's investigation of his request to transfer).

The only integrated houses prior to 1965 were three of the snorkel squads, as well as Truck 42 and Engine 82, all of which were integrated in 1962. Tr. 376-77, 845, 965. These units were predominantly white with a few blacks in them. Tr. 377. Commissioner Quinn referred to the snorkel squads as "freedom wagons" and used them as showpieces for CFD publicity. Tr. 376-77, 464.

On August 13, 1965, the west side of Chicago erupted in violence—much of it aimed at the CFD—over the death of Dessie Mae Williams ("Williams"). Def. Grp. Exh. 107; Tr. 609. Williams, an African-American, was killed when the all-white Truck 26 drove out of its house in a predominantly African-American neighborhood with an unmanned tiller, striking a sign, which in turn fell on Williams. Tr. 212-13, 572, 924-26, 996; Def. Grp. Exh. 107. During the rioting, African-American firefighters were ordered to Truck 26's house "to more or less pacify the neighbors at that time. They were asking where were the black firemen." Tr. 926; see also Tr. 572, 609, 996.

In response to the riots, the CFD disbanded some of the all-black companies and transferred the men to previously all-white companies on the south and west sides. Tr. 572-73, 927, 955; Def. Exh. 94. These fire houses on average had one African-American per shift. Tr. 213-14,

275-77, 884, 928, 955-56, 985-86. Other companies remained predominantly African-American for several years following the riots. Tr. 337-40.

Discrimination continued in the CFD into the late 1970s. For instance, for several days after his 1969 assignment to the all-white Truck 34, Winbush came to work only to be told by the officer on duty that he was not on his shift, and should go home and come back for the next shift. Tr. 341-42. This went on until the division marshal intervened. *Id.* at 342. Once Winbush started work, the white men welcomed him by stating that they had previously run out another black firefighter and they would run him out as well. Tr. 343. A series of incidents followed, including one in which someone wrote "nigger" on his locker. Tr. 344. Winbush's assignment to Truck 34 ended when he called the police to investigate after he had found in the fire house backyard his uniform with a bunch of holes in it and his fire clothes, which he had to pay for himself, ripped up. Tr. 345. The fire captain or lieutenant told the police that neighbors had broken into the firehouse. Tr. 345-46. The police called for an evidence technician to lift fingerprints. Tr. 346-47. While the police were there, the Chief of Personnel called Winbush and told him " 'you're in a bunch of trouble. You're going to the shine truck.' " Tr. 347. Winbush was then transferred to the predominantly African-American Truck 42. Tr. 347-48.

De la Cerna met with similar hostility when he sought redress for discriminatory treatment as an engineer in 1967. He testified that his white captain forced him to give up his prime-time June 1967 furlough to a white firefighter candidate, despite de la Cerna's seniority (which was how furloughs were chosen at the time). Tr. 516-18. De la Cerna completed a form to file charges of race discrimination against his captain. Tr. 518-19. He had a difficult time submitting the charges "because nobody would take them." Tr. 519. Eventually, one chief finally signed and forwarded the charges. *Ibid.*

After his charges were submitted, de la Cerna was told to report to Commissioner Quinn's office for 10 days in a row. Tr. 523. Each day de la Cerna waited from morning until mid- to late-afternoon, at which point Quinn's secretary would tell de la Cerna that Quinn was not coming into the office and he should return the next day. Tr. 524. At the end of 10 days, Commissioner Quinn told him to go back to his company. *Ibid.* The CFD took no action on de la Cerna's complaint until a lawyer intervened on his behalf. Tr. 529-32. In the meantime, nonminority firefighters in de la Cerna's house retaliated against him for submitting the charges. Tr. 520-21. When de la Cerna was transferred in 1967 or 1968, Tr. 524-25, his new captain told him that word was that he was a "bad nigger" and he would " 'never get a company as long as [he was] in the Second Division.' " Tr. 526.

In addition to these specific incidents, other firefighters told of being called derogatory names; firehouses with beds in which only African-American firefighters slept; being excluded from the dining room; and having nonminorities refuse to help them with their household duties, even though the nonminorities helped one another. *E.g.*, Tr. 278-79, 608, 614-15, 996-97. Witnesses also testified that minorities were not given the opportunity to "act-up"—take on the responsibilities for missing officers—at all-white companies, even when they had more seniority than the other firefighters. *E.g.*, Tr. 214-15, 238-39, 387-88, 902, 988.

In the late 1960s and early 1970s, the CFD and City initiated minority recruitment activities. Tr. 112-13, 116, 193-94, 235. This initial recruitment had little impact; by 1973-74, at most, 205 African-Americans, or 4%, were on the job, Tr. 115, 353, and there were fewer than 20 Hispanics, out of a total of approximately 4500 CFD personnel. Tr. 114-16, 235. Entire sections of the CFD remained all-white through the 1970s. Tr. 114, 219, 280-83, 971, 1050, 1056. And several African-American witnesses testified that in the 1960s and early 1970s they

were told by white superiors that they would never get promoted. *E.g.*, Tr. 873, 916. From the 1940s through the 1980s, on average there was only one black battalion chief at a time. *E.g.*, Tr. 407, 476-83, 858-59. For example, Louis Galante testified that when he become fire commissioner in 1983, not one of the 109 battalion chiefs was a minority and only 9 or 10 of the 159 captains were minority. Tr. 858-59.

CFD Litigation History

In 1973, the United States sued the City, alleging that the CFD's hiring and promotional practices unlawfully discriminated against African-Americans and Hispanics. The district court denied the United States' motion for a preliminary injunction to enjoin use of the 1968 hiring examination results. Def. Exh. 86(a). The United States appealed, and the court of appeals granted a stay pending appeal. Def. Exh. 86(b). While the appeal was pending, the City determined that it could not successfully defend the hiring claims. Accordingly, the City entered into a consent decree in 1974 providing an interim 50% hiring ratio for minorities for four years and a long-range goal of increasing the minority composition of the CFD to become more representative of the City as a whole. Def. Exhs. 86(c) and 86(d).

Rather than hire minorities under this consent decree, the City between 1974-77 hired no firefighters and made no promotions. *E.g.*, Tr. 221-22, 285, 292, 769. This decision was justified by neither tactical changes, Tr. 855, nor budgetary constraints, Tr. 821. Although Commissioner Quinn told Winbush during this period that the CFD did not need anybody, Tr. 350, Quinn also one day walked up to Winbush, pushed his finger into Winbush's chest, shoved him against a wall and asked: " 'What's your problem, kid? You got a job. Your brother's got a job. Your daddy's got a job, he is going to be a chief, you are going to be a lieutenant, your brother is going to [be] a lieutenant. What are you worrying about them

niggers for? They're only going to come in and screw up our job.' " Tr. 374.

The lack of hiring, combined with attrition, left fire companies severely understaffed, hindered fire operations, and harmed morale. *E.g.*, Tr. 225-27, 284-85, 356-60, 485-88, 573-75. The shortstaffing not only led the CFD to forgo disciplinary suspensions, Tr. 357, but also led to the recall of firefighters discharged for disciplinary reasons. Tr. 540-42. Many witnesses testified that all of these conditions caused the 1980 firefighters strike. *E.g.*, Tr. 227, 297-98, 360.

The lack of hiring also led the United States to seek enforcement of the 1974 consent decree. Def. Exh. 90. In 1977, the district court entered an order requiring compliance with the interim 50% minority hiring goal. *Ibid.* A supplemental hiring order was entered in September 1978 allocating 120 of the 280 entering vacancies to blacks or Hispanics. Def. Exh. 87. In June 1979, an agreed hiring order provided that if the new 1979 hiring eligibility list were used for more than two years or 500 names, all additional hiring was to be done on the basis of a 50% minority hiring ratio. Def. Exh. 88. This order also retained the long-range hiring goal from the 1974 consent decree. *Ibid.*

Those minorities that had been hired pursuant to court order encountered discrimination. Benny Crane, who is African-American, worked as a trainer at the fire academy in 1977 when the first class of firefighters with a large percentage of minorities began. Tr. 575. He testified that several high ranking CFD officials told the trainers that " 'they can make us hire [minorities] but they can't make us keep them,' " Tr. 576; and " 'We're not going to allow [minorities] to take over this Department,' " Tr. 579. Consequently, the training for the 1977 class was made very comprehensive and demanding. Tr. 576-77.

With regard to the promotional examinations, the district court initially upheld their validity under Title

VII. The United States appealed, and the court of appeals reversed and remanded the case for further proceedings. *See United States v. City of Chicago*, 573 F.2d 416, 429 (7th Cir. 1978). At that point, the City administered in 1978 new promotional examinations for each CFD rank.

Rankings on the 1978 lieutenants' and captains' examinations were based on an applicant's score on a written multiple choice test (40%); efficiency ratings (30%); and the score on an oral examination (30%). Tr. 90-91. The efficiency rating consisted of supervising officers' evaluations—with little or no guidance—on quality of work, quantity of work, dependability, attendance and promptness, and interpersonal relations. Tr. 182, 855-56. The ratings were completed in pencil and were passed up the chain of command to the fire commissioner, who had the final word. *E.g.*, Tr. 295-96, 386, 418. When Louis Galante took over as Fire Commissioner in 1983, he determined that approximately 40% of the nonminority officers had received efficiencies above 90, and nearly all the blacks had received efficiencies "down below 80, 82, 84." Tr. at 862. See also Tr. 386, 589-92, 887-88, 909, 959, 971-72, 992, 998-99.

In early 1980, DOJ notified the City that it intended to file suit over the 1978 examinations because of their severe adverse impact upon minorities. The City concluded that the exams had not been adequately validated, and that the efficiency ratings were racially discriminatory. Tr. 90, 107, 117; Def. Exhs. 29-36; 40-47. Because the City concluded that it could not defend these exams, it entered into the *Albrecht* consent decree. Tr. 108-09, 117. In the decree, the City agreed to a 1 minority/4 white promotional ratio for the ranks of lieutenant and engineer until new, validated promotional exams could be given. Def. Exh. 90. For the ranks of captain and battalion chief, this ratio was not feasible because there were too few minorities in the qualifying ranks to implement such a ratio. *Id.* Instead, the City agreed to implement a long-

term goal to increase substantially minority participation at every rank so that the composition of each rank would become more representative of the rank below it from which promotions were made. *Id.*

ARGUMENT

In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), this Court held that race-based affirmative action should be assessed under the strict scrutiny test. See *id.* at 494. Under strict scrutiny, a program "must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995).

This test still permits state and local governments to take remedial action rather than merely ceasing discriminatory practices; thus, the government may act affirmatively to redress the continuing effects of prior discrimination. In *Croson*, for example, the Court made clear that municipalities have a compelling interest in remedying the continuing effects of prior discrimination. See 488 U.S. at 492-93 (plurality opinion); *id.* at 511 (Stevens, J., concurring in part and concurring in the judgment); see also *Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501, 515-16 (1986); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274-75 (1986) (plurality opinion). Moreover, a majority of the Court acknowledged that "some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." 488 U.S. at 509 (plurality opinion); accord *id.* at 511 & n.1 (Stevens, J., concurring in part and concurring in the judgment); *id.* at 519 (Kennedy, J., concurring in part and concurring in the judgment). See also *Wygant*, 476 U.S. at 280 (plurality opinion) ("to remedy the effects of prior discrimination, it may be necessary to take race into account"). And in *Adarand*, the Court took pains "to dispel the notion that strict scrutiny is 'strict in theory, fatal in fact.'" 515 U.S. at 237 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J.,

concurring in the judgment)). Indeed on two occasions race-conscious affirmative action has been sustained under strict scrutiny. See *United States v. Paradise*, 480 U.S. 149 (1986) (four-justice plurality upholding promotional quota for minorities in a state police department); *Local No. 28 of the Sheet Metal Workers' International Association v. EEOC*, 478 U.S. 421 (1986) (upholding remedial order requiring union apprenticeship program to admit minorities).

Here, the district court applied strict scrutiny and found the 1987 affirmative action plan narrowly tailored to redress the pattern of racial exclusion of the type that the Court acknowledged in *Croson* would justify such a plan. Petitioners never claim that the district court failed to apply strict scrutiny. Instead, they criticize the manner in which both the district court and the court of appeals weighed the evidence. In fact, the evidence before the district court established that the manifest underrepresentation of minorities in the upper ranks of the CFD was the product of years of intentional exclusion of minorities who were otherwise fully qualified and eager to advance into the CFD's hierarchy. After years of discrimination at the entry level and in the lower ranks had left the Department hierarchy artificially white, some measure of affirmative action was constitutionally permissible to redress the continuing effects of prior discrimination. Thus, the conclusions of the courts below regarding the sufficiency of the CFD's basis for taking remedial action were amply supported by the evidence adduced at trial, and the judgment below was correct. And in any event, there is no justification for plenary review in this case merely to reweigh the evidence as petitioners urge.

1. Petitioners' first contention is an entirely fact-bound claim that the statistical, anecdotal, and historical evidence presented at trial failed to support the finding that the underrepresentation of minorities at the rank of fire captain represented the continuing effects of prior discrimination. See Pet. 9-10. The record does not support

that claim, which is inappropriate for this Court's consideration in any event.

The propriety of relying on statistical evidence in order to justify affirmative action is quite clear. It has long been the law that statistical evidence of a clear racial imbalance between an employer's workforce and the qualified labor pool creates a prima facie case of intentional racial discrimination. See, *e.g.*, *Hazelwood School District v. United States*, 433 U.S. 299, 308-13 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-43 (1977). For this reason, in *Croson* the Court explained that such a statistical showing justifies remedial action. See 488 U.S. at 501-02; see also *id.* at 509 (plurality opinion); *Wygant*, 476 U.S. at 274 (plurality opinion). Indeed, courts applying strict scrutiny have consistently upheld affirmative action when supported by such statistical evidence. See, *e.g.*, *Aiken v. City of Memphis*, 37 F.3d 1155, 1163 (6th Cir. 1994); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1553-57 (11th Cir. 1994); *Jansen v. City of Cincinnati*, 977 F.2d 238, 242 (6th Cir. 1992), cert. denied, 508 U.S. 911 (1993); *Vogel v. City of Cincinnati*, 959 F.2d 594, 599-600 (6th Cir.), cert. denied, 506 U.S. 827 (1992); *Stuart v. Roche*, 951 F.2d 446, 450-52 (1st Cir. 1991), cert. denied, 504 U.S. 913 (1992); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1459-60 (8th Cir. 1991), cert. denied, 502 U.S. 1059 (1992).

As the courts below noted, the evidence here showed an undeniably statistically significant disparity between the racial composition of the qualified labor pool and the upper ranks of the CFD. See Pet. App. 7-8, 22-23. That evidence provided a sufficient basis for the conclusion that the underrepresentation of minorities was the result of prior discrimination. In fact, petitioners do not launch any attacks against the methodology employed by the statistician who testified on behalf of the City.[4] And, as

[4] The propriety of binomial probability analysis of the type Dr. Suchanek employed as a method for inferring discrimination has

we explain above, Dr. Suchanek conducted an increasingly restrictive series of benchmark studies that demonstrated not only gross statistical disparities between the expected and actual racial composition of the ranks of the CFD, but also that minorities were interested and qualified for hiring and promotion but were unable to enter and advance in the CFD at the rate of nonminorities until the CFD abandoned discriminatory hiring and promotional practices. Equally important, Dr. Suchanek also found gross statistical disparities between the composition of the upper ranks of the CFD and the pool of those actually hired, confirming the existence of discrimination even within the pool of those interested in and qualified for employment. Indeed, such evidence has consistently been held sufficient to establish the existence of discrimination against minorities in the pool of those qualified for employment. See *Boston Police Superior Officers Federation v. City of Boston*, 147 F.3d 13, 21 (1st Cir. 1998); *Aiken*, 37 F.3d at 1163; *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1540-41 (11th Cir. 1994), cert. denied, 514 U.S. 1065 (1995); *Vogel*, 959 F.2d at 599-600; *Stuart*, 951 F.2d at 450-52; *Donaghy*, 933 F.2d at 1460; *Howard v. McLucas*, 871 F.2d 1000, 1007 (11th Cir.), cert. denied, 493 U.S. 1002 (1989).

Petitioners' only complaint about the statistical evidence is that it "was too remote in time to justify preference . . . ." Pet. 9. And they correctly cite *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), cert. denied, 510 U.S. 1164 (1994), for the proposition that evidence of discrimination many years prior to the adoption of an affirmative action plan is, standing alone, too remote to establish the continuing effects of that discrimination. See *id.* at 409. But here, Dr. Suchanek docu-

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been long settled. See, *e.g.*, *Castenada v. Partida*, 430 U.S. 482, 496-97 n.17 (1977). Differences in excess of two or three standard deviations, like those present here, generally demonstrate the existence of discrimination. See, *e.g.*, *Hazelwood*, 433 U.S. at 308 n.14.

mented that in 1987 there was a continuing effect on the composition of the rank of fire captain because of prior entry level and promotional discrimination. As Dr. Suchanek testified, the percentage of minorities that had been eligible to seek promotion to captain prior to the 1986 examination was artificially low as a result of prior discrimination: only those few minorities hired by 1977 could even theoretically have reached the qualifying rank of lieutenant and taken the previous captain's examination, given in 1979, and then sought promotion. See Tr. 71. The prior exclusion of minorities, continuing as it did until at least 1977, plainly had continuing effects in 1987, as the district court correctly found. See Pet. App. 21-23. As the plurality wrote of an analogous situation in *Paradise*: "Discrimination at the entry level necessarily precluded blacks from competing for promotions, and resulted in a Departmental hierarchy dominated exclusively by nonminorities." 480 U.S. at 168. Accord *Boston Police Superior Officers Federation*, 147 F.3d at 20.

The statistical evidence was bolstered by the historical and anecdotal evidence of the CFD's hostility to minorities, showing a climate of racial hostility that went all the way to the top of the CFD and persisted at least until the 1980 *Albrecht* decree and the CBA. To this petitioners respond only that such evidence "will rarely, if ever, show a systemic pattern of discrimination." Pet. 9. Of course, in this case, the anecdotal and historical evidence did not stand alone; as we explain, it supplemented, and was powerfully bolstered by the statistical case. Indeed, given the strength of the statistical case, the pattern of hostility that was proven through the anecdotal and historical evidence can be viewed simply as making it more implausible that the underrepresentation observed by Dr. Suchanek had some nondiscriminatory explanation. But, in addition, this evidence explains as well why minorities would have perceived the CFD to be a hostile environment. There is thus every reason to believe minority applications would have been greater—as they eventually were—

but for this racial climate. Accordingly, even if anecdotal evidence alone would not have been sufficient to warrant affirmative action, the combination of anecdotal and statistical evidence is "potent." *Coral Construction Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992); see *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1415 (9th Cir. 1991), cert. denied, 503 U.S. 985 (1992); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir.), cert. denied, 498 U.S. 983 (1990). See also *Teamsters*, 431 U.S. at 337-39 (statistical evidence of disparity between workforce and qualified labor pool bolstered by anecdotal evidence established intentional discrimination against minorities).[5]

Petitioners also observe that "[r]acial remarks unrelated to the decisional process are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements were uttered by a decisionmaker." Pet. 9. Petitioners do not explain, however, how this proposition is applicable in this case. As the courts below noted, the evidence showed here that the senior officials of the CFD were hostile to minorities and adopted policies designed to exclude them from the Department. See Pet. App. 9-10, 24-26. And, as we explain above, there was abundant evidence that those running the CFD wanted to keep minorities out. Commissioner Quinn, for example, was willing to halt all hiring—even at the risk of endangering public safety—rather than comply with federal court orders directing the CFD to cease discriminatory practices.

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[5] To support their attack on the historical and anecdotal evidence, petitioners cite only *Middleton v. City of Flint*, 92 F.3d 396 (6th Cir. 1996), cert. denied, 117 S. Ct. 1552 (1997). There the anecdotal evidence was not supplemented by an appropriate statistical showing, which was found wanting because it did not compare the composition of the workforce to the composition of the qualified labor pool. See *id.* at 405-09.

2. Petitioners make an even narrower attack on the evidence relating to prior discrimination against Hispanics, claiming that they were only "randomly included" in the 1987 affirmative action plan. Pet. 11. In fact, the evidence relating to Hispanics differed from that relating to African-Americans only in that it showed that Hispanics had not applied to become firefighters in proportion to their representation in the qualified labor pool until the 1980s. See Pet. App 8. That deficiency, however, is largely explained by the CFD's undefensible use of a height requirement that discriminated against Hispanics. See Pet. App. 26. In any event, the statistical evidence, as we explain above, showed that until 1985 Hispanics, like African-Americans, were discriminated against in promotions, and that evidence was bolstered by direct evidence that senior officials in the CFD up to and including the Fire Commissioner were hostile to the presence of Hispanics in the Department. Indeed the district court expressly credited the statistical evidence regarding Hispanics, as well as the direct evidence that the CFD wished to exclude Hispanics from its ranks. See Pet. App. 21-23, 26-27. For their part, petitioners do not explain why the absence of statistical evidence of prior entry level discrimination forecloses as a matter of law the 5% promotional goal for Hispanics on the 1987 captain's examination, given the abundant statistical evidence that Hispanics faced promotional discrimination and were grossly underrepresented at the rank of captain when compared to their representation in the ranks below, as well as the direct evidence of the Department's animosity toward Hispanics.

Petitioners also do not explain why the promotional goal for Hispanics has any meaningful significance to the outcome of this case. The promotional goal for Hispanics under the 1987 plan was 5%, and had the promotional list been used in strict rank order, 4.7% of the persons promoted would have been Hispanic. See Def. Exh. 6 at 1. A .3% measure of affirmative action, not shown to

have actually resulted in the promotion of more Hispanics than otherwise would have been promoted, hardly warrants plenary review.

3. Petitioners also attack the 1987 affirmative action plan on the ground that it is not an appropriate remedy for "isolated racial remarks." Pet. 10. Again, while we have no quarrel with this proposition, petitioners' attempt to dissect this case into these individual components ignores the elaborate and comprehensive record here. The evidence at trial established much more than "isolated racial remarks." Rather, the statistical evidence demonstrated a widespread and systemic pattern of excluding minorities from hiring and promotional opportunities, and the historical and anecdotal evidence—including the racial remarks—made it all the more unlikely that the statistics had any innocent explanation. And based on this evidence, the district court found systemic discrimination (Pet. App. 21-27), and that finding was upheld on appeal (Pet. App. 7-10).

Petitioners do not claim that any circuit has reached a result contrary to the holding below on similar facts. Indeed, as we explain above, courts have consistently upheld affirmative action plans based on a combination of statistical and anecdotal evidence. In fact, the circuits are unanimous that in the face of such evidence, a public employer is entitled to depart from the rank order use of hiring or promotional lists. See, *e.g.*, *Boston Police Superior Officers Federation*, 147 F.3d at 22; *Edwards v. City of Houston*, 37 F.3d 1097, 1110-15 (5th Cir. 1994), vacated on other grounds en banc, 78 F.3d 983 (1996); *Peightal*, 26 F.3d at 1557-58; *Jansen*, 977 F.2d at 243-44; *Donaghy*, 933 F.2d at 1460-61; *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1446-47 (9th Cir. 1989), cert. denied, 498 U.S. 897 (1991); *Howard*, 871 F.2d at 1009.

Perhaps recognizing that there is at least statistical evidence of systemic discrimination in this case, petition-

ers add that the underrepresentation of minorities at the rank of captain when compared to the ranks below "was obviously the result of quotas in the lower ranks and not the result of discrimination in hiring or promotion." Pet. 11. This assertion, made without citation to the record, is inconsistent with the findings of the district court, sustained on appeal, that minority underrepresentation was the result of prior discrimination. Those findings were amply supported by the evidence. And petitioners adduced no evidence to support their claim that the composition of the ranks of firefighter and lieutenant was tainted by court orders or other affirmative action measures requiring the CFD to hire less qualified minorities; they only speculate on this point. In fact, the district court found that no unqualified minorities had been promoted to the rank of lieutenant as a result of prior court orders (Pet. App. 27-28), and as we explain above the racial composition of the rank of captain was far different than the composition of the rank of lieutenant—a result Dr. Suchanek found had no nondiscriminatory explanation. After surveying the evidence, the court of appeals, even acknowledging the possibility that the percentage of minorities in the CFD "may be inflated to some extent by affirmative action" (Pet. App. 11), concluded that the evidence showed "that, had it not been for the City's discrimination against blacks and Hispanics in the past, the percentage of black and Hispanic captains would be at least a third of the potential applicant pool; and that is all it is, even with the affirmative action challenged here." Pet. App. 11-12.

Petitioners' final complaint about the remedy employed in the 1987 affirmative action plan is to assert that "[t]he City did not explore race-neutral alternatives to increase minority representation in the captain rank. . . ." Pet. 11. The record does not support this assertion. Commissioner Hoskins concluded that race-neutral alternatives could not remedy the continuing effects of prior discrimination because only incumbent lieutenants can be pro-

moted to the rank of captain, and if the 1987 promotional list were used in strict rank order meaningful progress could not be made toward eliminating the gross underrepresentation of minorities in that rank attributable to prior discrimination. See Def. Exh. 6 at 1, 3. And as the district court found, the City had in fact used race-neutral means to provide training and study materials for the captain's examination. See Pet. App. 27. Petitioners do not even identify a race-neutral means the City could have used to redress the continuing effects of its prior discrimination at the rank of captain—it could hardly have located the victims of discrimination occurring many years earlier and suddenly made them fire captains. Thus, on this record, some departure from strict rank order use of the list was the only way to redress prior discrimination. And as we explain above, this type of remedy has been consistently upheld in other circuits. A public employer, faced with gross underrepresentation or minorities in the upper reaches of its work force as the consequence of its own prior discrimination, is not required to wait until all the incumbents hired and promoted under the prior discriminatory system retire before it can begin to redress the continuing effects of that prior discrimination. Rather, "[s]ome promptness in the administration of relief [i]s plainly justified." *Paradise*, 480 U.S. at 180 (plurality opinion).

The remedy utilized by the 1987 affirmative action plan is entirely consistent with strict scrutiny. To determine whether a race-conscious remedial plan is narrowly tailored under the strict scrutiny test, a court should examine "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor markets; and the impact of the relief on the rights of third parties. *Paradise*, 480 U.S. at 171 (plurality opinion). Accord, *e.g.*, *Sheet Metal Workers*, 478 U.S. at 480-81 (plurality opinion); *id.* at 485-86 (Powell, J., concurring in part

and concurring in the judgment); *Stuart*, 951 F.2d at 453-55; *Associated General Contractors*, 950 F.2d at 1416-18; *Donaghy*, 933 F.2d at 1460-61. The 1987 affirmative action plan satisfies each of these requirements.

First, as we explain above, some race-conscious relief was necessary. The only race-neutral means of assisting minorities—providing study materials to facilitate knowledge of the material to be tested—had been utilized for the 1987 examination. Beyond that, only a departure from rank order was available, because only the lieutenants who have passed the examination can be promoted, and rank order use of the list would have made no progress toward ameliorating minority underrepresentation at the rank of captain.

Second, the affirmative action promotions involved a limited and flexible goal. The plan envisioned promoting only minorities who had passed the 1986 examination with scores statistically indistinguishable from the non-minorities they passed over, all of whom were eventually promoted under the wrap-around agreement. The plan would be periodically reviewed and persist only until statistically significant imbalances had been ameliorated. Limiting affirmative action to an identifiable objective and fully qualified individuals "is an important indicium of narrow tailoring." *Mackin v. City of Boston*, 969 F.2d 1273, 1278 (1st Cir. 1992), cert. denied, 506 U.S. 1078 (1993).

Third, the promotional goal of 20% African-Americans and 5% Hispanics was not excessive when compared to the promotions that would have been made had the list been used in strict rank order, which would have awarded promotions to 14% African-Americans and 4.7% Hispanics. Had promotions been made only in proportion of minority representation in the qualified labor pool, of course, the disparity between the ranks of captain and lieutenant would have persisted for decades, until all the incumbents hired and promoted under the prior dis-

criminatory system had retired. Thus some increment over the minority composition in the qualified labor pool was appropriate to make some meaningful progress toward ameliorating racial imbalance. This Court recognized this same reality in *Paradise*, when it approved a 50% promotional plan until 25% of the rank had become African-American in order to achieve some promptness in relief. See 480 U.S. at 179-82. And as we explain above, the court of appeals surveyed the evidence and acknowledged that the CFD's affirmative action plan did no more than approximate what the rate at which minority promotions would have been absent prior discrimination. See Pet. App. 11-12.

Finally, the affirmative action promotions at issue did not unduly trammel the interest of nonminorities. The wrap-around agreement, under which every nonminority passed over for affirmative action reasons was eventually promoted, meant that the plan in practice involved at most a one-year delay in promotions for three nonminorities. As the plurality explained in *Paradise*, " '[d]enial of a future employment opportunity is not as intrusive as loss of an existing job' and plainly postponement imposes a lesser burden still." 480 U.S. at 183 (plurality opinion) (quoting *Wygant*, 476 U.S. at 282-83 (plurality opinion) (citations omitted)). Accord *Boston Police Superior Officers Federations*, 147 F.3d at 24.

As we explain above, a number of other circuits, like the court of appeals in this case, have endorsed the use of a limited number of non-rank-order promotions to address gross racial imbalances attributable to prior discrimination. Petitioners do not identify any decision in any circuit that forbids the use of such a remedy on facts remotely resembling these. And in any event, the fact-bound question whether the particular evidence in this case supported the conclusion of the courts below that the CFD had engaged in a pattern of systemic exclusion of minorities, rather than merely "isolated racial remarks"

that petitioners correctly state would not justify this affirmative action plan, does not merit plenary review.

4. The closest petitioners come to raising any issue of general significance is their claim that the question whether a public employer has a sufficient justification to engage in affirmative action is a question of law subject to independent appellate review, rather than a question of fact to be reviewed deferentially. See Pet. 12-13. As they correctly note, other circuits have concluded that " 'whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling state interest for the municipality to enact a race-conscious [remedy], is a question of law' subject to plenary review." *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir. 1996), cert. denied, 117 S. Ct. 953 (1997) (quoting *Concrete Works of Colorado v. City & County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994), cert. denied, 514 U.S. 1004 (1995)).

The decision below, however, is not inconsistent with the law in other circuits. At no point did the court of appeals announce that it would defer to the district court's conclusion that the City had a constitutionally sufficient predicate for engaging in affirmative action. Rather, in the words of the court of appeals, it would afford "proper weight to the district judge's findings of fact." Pet. App. 7. Of course, even in affirmative action cases, there are findings of fact to be made by the district courts. For example, here the district court found that the hiring and promotional practices utilized by the CFD in the 1970s and 1980s were intended to disadvantage minorities. See Pet. App. 9-10. And when the court of appeals deferred to this finding, it did no more than apply the settled rule that the question of discriminatory intent is one of fact on which a district court's findings should be upheld unless clearly erroneous. See *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985). At the same time, in evaluating what types of justifications for affirmative action would be constitutionally acceptable, the court of

appeals treated the question as one of law to be independently reviewed on appeal. See Pet. App. 5-6. Thus, the decision below is entirely consistent with the approach of other circuits.

5. Finally, and quite inexplicably, petitioners claim that the courts of appeals "incorrectly affirmed the district court's finding that 6 of the 9 petitioners would not have been promoted if promotions were made in rank order." Pet. 13. This appears to be a reference to the district court's ruling on standing. After trying the case on the merits, the district court found that six petitioners lacked standing because absent the 1987 affirmative action plan, the City would have only promoted applicants up to rank 146, and accordingly would not have promoted the petitioners ranked beyond that. See Pet. App. 18-19. The court of appeals, however, declined to decide that issue, instead reaching the merits and holding the 1987 affirmative action plan to be constitutional. See *id.* 4-5, 11-12. Thus, these six petitioners were ultimately not prejudiced by the district court's ruling on this point, since the court of appeals reached their attack on the affirmative action plan at issue and rejected it on its merits. Accordingly, the correctness of the district court's standing ruling is, at this stage of the litigation, an entirely academic point.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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